APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21088

VIRGINIA WILLYS LUCOM and WILSON C. LUCOM,
Appellants,

v.

ATLANTIC NATIONAL BANK OF WEST PALM BEACH, FLORIDA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(December 10, 1965.)

Before JONES, WISDOM and GEWIN, Circuit Judges.

JONES, Circuit Judge: In 1953 the appellant,[1] then a Florida resident, was adjudicated incompetent and restored a few months later. The appellee bank was the guardian of her property during her incompetency. Shortly after her restoration, she re-entered a mental hospital in Philadelphia. It appears her children induced her to Philadelphia without revealing the purpose of the trip. The children then brought a habeas corpus proceeding in a Pennsylvania state court to establish the legality of her confinement, and she was declared "mentally ill" within the meaning of the

[1] Virginia Willys DeLanda. She has since married Wilson C. Lucom, who joins her in this action.

Pennsylvania Mental Health Act of 1951.[2] An adjudication of "incompetency" would necessarily have been under a different statute.[3] A Florida county court reappointed appellee bank as guardian of appellant's property on the basis of the Pennsylvania judgment. Appellant was restored in New York in 1954. She is now a resident of New York.

Appellant did not appeal the appointment of a guardian but attacked collaterally by contesting the accounting in 1954 and 1955 on the basis that the guardianship was invalid for lack of compliance with Florida law. The contest reached the Supreme Court of Florida as *Lucom* v. *Atlantic Nat'l Bank*, Fla. 1957, 97 So. 2d 478, which held the bank and its attorneys entitled to compensation whether or not the guardianship was valid. The court expressly omitted ruling on the validity of the appointment, holding that the bank was at least a guardian de facto and, as such, was entitled to be paid.[4] The accounting was approved and discharge ordered in 1955 but final discharge was delayed by litigation until October 11, 1961.

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[2] "Mental illness" shall mean an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him as to be under care. The term shall include "insanity," "unsoundness of mind," "lunacy," "mental disease," "mental disorder," and all other types of mental cases, but the term shall not include "mental defectiveness," "epilepsy," "inebriety," or "senility." Pa. P.L. 141, June 12, 1951 § 102(11).

[3] "Incompetent" means a person, who, because of mental infirmities of old age, mental illness, mental deficiency, drug addiction or inebriety, is unable to manage his property, or is liable to dissipate it or become the victim of designing persons. It includes a person heretofore declared to be a lunatic, an habitual drunkard, insane or weak-minded. Pa. P.L. 158, June 28, 1951, § 102(3).

[4] The same cause reached the Florida Supreme Court again as Lucom v. Potter, Fla. 1961, 131 So. 2d 724, which settled a controversy as to the amount of attorney's fees.

This case was brought in Federal district court on October 8, 1962, for damages resulting from a taking of property without due process of law by way of the alleged invalid guardianship, alleged disloyal and negligent actions of the guardian, the withholding of appellant's papers, and fraud and conspiracy to accomplish all this. Jurisdiction was grounded on diversity and a claimed Federal question under the Fourteenth Amendment. Summary judgment was entered for the bank on the grounds that the action was barred by limitations and that the Florida adjudications were res judicata or that they collaterally estopped the appellant on all questions except the count for production of papers. The count for production was later dismissed for failure to comply with orders to specify the documents desired. Four appeals are consolidated here: from the summary judgment; from denial of relief from the summary judgment under Rule 60(b) of the Federal Rules of Civil Procedure on the ground of newly discovered evidence; from the dismissal of the count for production; and from denial of disqualification of one of the bank's attorneys on a claim of conflict of interest.

Florida has two limitation statutes which might be relevant to this matter: Fla. Stat. Ann. § 95.11, which provides a general four-year period and a three-year period for actions for fraud;[5] and Fla. Stat. Ann. § 746,

[5] Actions other than those for the recovery of real property can only be commenced as follows:

(4) Within four years.—Any action for relief not specifically provided for in this chapter.

(5) Within three years.—

(d) An action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Fla. Stat. Ann. § 95.11

which provides that no action may be brought against a guardian more than a year after discharge.[6] Appellant argues that Section 746.14, alone, applies and that, as suit was instituted within a year of final discharge, the action may be maintained. We find the Florida law to be to the contrary.

Insofar as the briefs and our research have disclosed, only one Florida case has considered the interaction of these particular statutes. That case, *Beck* v. *Barnett Nat'l Bank*, Fla. 142 So. 2d 329, held that an action commenced more than a year after discharge was barred by Section 746.14 notwithstanding that the period provided by Section 95.11 had not run since the acts complained of. Neither this holding nor any language in the opinion implies that Section 95.11 cannot bar an action instituted within a year of discharge. On the contrary, Florida cases hold that when two statutes limit the time in which an action may be brought, both apply and the dilatory litigant in caught by whichever runs first.

In *Palmquist* v. *Johnson*, Fla. 1949, 41 So. 2d 313, the Florida Supreme Court held that the owner of the record title to real property under a tax deed was precluded from maintaining a suit for possession by a provision requiring such suit to be brought within four years[7] despite the general statute,[8] amended subsequent to the tax deed statute

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[6] Upon the consideration of the application for discharge and of the objections thereto, if any, and of the evidence, if the county judge is satisfied that the guardian has faithfully and completely discharged his duties and has rendered complete and accurate final returns and has delivered the assets of the ward to the person entitled thereto, the county judge shall enter an order of discharge. Such discharge shall operate as a release from the duties of the guardianship and as a bar to any suit against said guardian or his surety, unless such suit is commenced within one year from the date of the discharge. Fla. Stat. Ann. § 746.14.

[7] Fla. Stat. Ann. § 196.06.

[8] Fla. Stat. Ann. § 95.16.

and so considered as more recent, which would have allowed the suit. It does not appear that the decision turned on one section being a "special" statute and the other being "general," as the appellant contends here, but rather upon duty of the court to harmonize apparently conflicting statutes.

Similarly, the Florida court, in *State* v. *Haddock,* Fla., 149 So. 2d 552, considered a statute allowing the probate of a will to be revoked "at any time before discharge"[9] and one requiring petitions for revocation to be filed within six months after a notice required by statute.[10] No irreconcilable conflict was found. As the notice had been given and over six months had elapsed, the suit was barred even though the other section would have allowed it.

Of the cases which have come to our attention, the one most nearly in point is *Perry* v. *Reichert,* 113 Fla. 125, 151 So. 403. Suit was brought against an administrator to recover on an account the decedent had owed for just under four years at death. The general, three year statute[11] had run but a special statute[12] stating that debts due from decedents on accounts owing for more than five years at death would be expunged, was argued to be controlling. The court found that the special statute was not intended to allow suits otherwise barred. The same rationale is applicable here to the appellant's argument.

Having determined that either statute might bar the appellant's action, we turn now to the question of the time

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[9] Fla. Stat. Ann. § 732.30.

[10] Fla. Stat. Ann. § 732.28.

[11] Fla. Comp. Gen. Laws § 4663(5)(5) (1927), now Fla. Stat. Ann. § 95.11(5)(e).

[12] Fla. Comp. Gen. Laws § 5620 (1927).

from which the period began to run under Section 95.11.[13] The appellant contends that the statute does not begin to run until she has accrued a "complete cause of action." If the adjective "complete" is intended to add anything to the meaning of the phrase "cause of action", the law of Florida is otherwise.

In Florida, a cause of action accrues and the statutory limitation period commences when the invasion of a right occurs,[14] if there is notice of the invasion,[15] even though the damages may not materialize until later.[16] The only exceptions appear to be where there is no one to sue so that no action may be brought[17] and where the party at fault fraudulently conceals the invasion of right.[18] The invasions of the appellant's rights, if invasions there were, took place in 1953 when the guardianship was obtained and should have been known to the appellant at that time. In any event, the invasions were known in 1954 when the appellant attacked the accounting of the bank. It is not

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[13] We do not mean to imply that the time has necessarily not run under § 746.14. As noted by the trial judge, "substantial reasons can be advanced for holding that the one year statute started running no later than the compliance by the defendant with the provisional order on discharge by the County Judge." See Davis v. Combination Awning & Shutter Co., Fla., 62 S. 2d 742.

[14] Cristiani v. City of Sarasota, Fla. 1953, 65 So. 2d 878.

[15] City of Miami v. Brooks, Fla. 1954, 70 So. 2d 306.

[16] Cristiani v. City of Sarasota, supra.

[17] Berger v. Jackson, Fla. 1945, 23 So. 2d 265. That all the elements necessary for a successful suit may not be available is insufficient to prevent the statute from running. Seaboard Air Line R.R. v. Ford, supra.

[18] Metcalf v. Johnson, Fla., 113 So. 2d 864. It is the invasion itself which must be concealed, not merely the extent of the invasion or the injury. Compare Buck v. Mouradian, Fla., 100 So. 2d 70, cert. den., 104 So. 2d 592, with Proctor v. Schomberg, Fla., 63 So. 2d 68.

clear that the statute has been tolled at all in this case[19] but any tolling which may have occurred ceased in 1954 when the appellant was adjudicated competent in New York. The four year statute has long since run on those counts to which it is applicable.

Appellant alleges fraud, to which a three year limitation period running from the discovery of the facts constituting the fraud applies. Proof of fraud or fraud as a defense requires a showing of certain elements, without which there is no cause of action.[20] It is doubtful whether these elements have been alleged or proven in this case. In any event, the fraud alleged was incident to the procurement of the guardianship, which was in 1953. While it does not appear that fraud per se was alleged in the collateral attack on the guardianship, virtually all the facts relied upon here as constituting the fraud were asserted in that proceeding. As the facts constituting the fraud were stated, it cannot be said that they had not been discovered. If there was fraud, it has long been barred by the three year statute.

Appellant alleges that she has been deprived of the possession of her property without due process of law as required by the Fifth and Fourteenth Amendments. If this is an attempt to state a Federal cause of action, it is in vain. It is well settled that the Fourteenth Amendment is a bar to state action, not individual misconduct. Any reliance on the Civil Rights Act[21] is equally futile as the

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[19] See Fla. Stat. Ann. § 95.05; Faulk & Coleman v. Harper, Fla., 62 So. 2d 62.

[20] See generally, Prosser, Torts, 3d Ed. § 100.

[21] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C.A. § 1983.

actions complained of must be done under color of law. *Dinwiddie* v. *Brown,* 5th Cir. 1956, 230 F. 2d 465, cert. den. 351 U.S. 971, 76 S. Ct. 1041, 100 L. Ed. 1490, reh. den., 352 U.S. 861, 77 S. Ct. 29, 1 L. Ed. 2d 72, settles this point. There the "allegation of the obtaining of a fraudulent judgment by private individuals," 230 F. 2d at 469, was held to state no cause of action under the Constitution or the Civil Rights Acts.

Since there was no cause of action stated which was not barred by limitation, the summary judgment below was correct.[22]

The newly discovered evidence which formed the basis for the motion for relief from the summary judgment under Rule 60(b) is largely cumulative and relates to the same causes of action we find to be barred by limitations. There is no evidence of fraudulent acts such as would prevent the limitation statute for fraud from running as the acts, themselves, have long been known even if it is assumed that the precise part played by each actor was recently discovered. We find no abuse of discretion calling for reversal.

The count for production of documents was dismissed for failure to specify the documents desired after repeated opportunities to do so. Such action is in the sound discretion of the trial judge, and this discretion was not abused.

Appellant contends that one of the attorneys for the bank acted improperly in defending this action and should have been disqualified for a conflict in interest. There is no merit in this contention. *Marco* v. *Dulles,* S.D. N.Y. 1959, 169 F. Supp. 622, appeal dis., 268 F. 2d 192.

The judgments of the trial court are hereby

AFFIRMED.

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[22] It is unnecessary to decide whether the action is also barred by the prior litigation in the state courts.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellants, Virginia Willys Lucom and Wilson C. Lucom, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 10, 1965

Issued as Mandate: January 4, 1966

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Opinion on Motion for Summary Judgment

Filed August 8, 1963

(Title Omitted)

This matter is presently before the Court on the defendant's motion for summary judgment. After hearing argument, examining the exhibits, and considering the various briefs filed herein, the Court is of the following opinion.

STATEMENT OF FACTS

There is no material disagreement between the parties as to the factual background necessary to consideration

of the defendant's motion for summary judgment. The questions presented by that motion are principally whether this action is barred by res judicata including estoppel by judgment and/or the statute of limitations. Both of these questions are legal rather than factual in nature on the state of this record.

The suit arises out of a former incompetency guardianship in the County Judge's Court of Palm Beach County, Florida. The estate involved property in the value of some $1,900,000. The former ward and her husband, both currently citizens of New York, seek $1,205,000 compensatory and $1,000,000 punitive damages against the former guardian bank.[1] The defendant entered upon its guardianship of the property of the plaintiff by order of October 7, 1953. Active guardianship was terminated by order of May 25, 1955 wherein the guardian's final accounting was approved and discharge was directed upon turnover, against receipt, of all property which was accomplished within a few days following this order.[2] The plaintiff-ward took two appeals to the Supreme Court of Florida from these orders of the County Judge's Court. The first of these appeals is of particular significance in determination of this cause.[3] The table in footnote below presents

[1] It is interesting to note that despite the substantial ad damnum that no actual allegations as to diminution of the estate during the guardianship are made except certain allegations of negligent failure to collect promissory notes and other administrative negligence trivial in comparison to the total damages sought, and the plaintiff also seeks to recover extensive administration and litigation expense incurred.

[2] Other than a statutory Court cost reserve of $45.15 since paid out, and unspecified papers which plaintiffs allege and defendant admits it still holds notwithstanding the receipt, but which defendant offers to turn over against payment for making copies.

[3] Lucom v. Atlantic National Bank, 97 So. 2d 478 (Fla. Sup. 1957). The second appeal was Lucom v. Potter, 131 So. 2d 724 (Fla. Sup. 1961).

a capsuled history of the events prior to the instant litigation.[4]

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[4] Dec. 1952—Plaintiff was first adjudged incompetent by County Judge of Palm Beach County.

May 1953—Plaintiff judicially restored to competency by Circuit Court of Palm Beach County.

July 1953—Plaintiff re-entered Pennsylvania hospital for mental sickness.

Sept. 1953—Plaintiff found "mentally ill" in habeas corpus proceeding in Pennsylvania Court.

Oct. 1953—County Judge of Palm Beach County re-appointed defendant as guardian after hearing (where plaintiff was represented by guardian ad litem) on strength of the Pennsylvania proceeding.

Dec. 1953—Plaintiff released from Pennsylvania hospital and returned to her home in Palm Beach.

Spring, 1954—Plaintiff started and abandoned restoration proceedings in Palm Beach County.

Spring, 1954—Plaintiff married co-plaintiff Wilson C. Lucom and moved to New York.

Summer, 1954—Plaintiff started restoration proceedings in New York.

Oct. 1954—New York restoration proceedings terminated in plaintiff's favor.

Dec. 1954 & Jan. 1955—Plaintiff filed objections to periodic accounting of defendant.

May 1955—Defendant filed final accounting.

May 1955—County Judge of Palm Beach County entered order approving accountings, awarding fees, overruling objections and ordering discharge.

May 1955—Plaintiff acknowledged receipt of her property from defendant.

May 1955—Plaintiff gave notice of appeal from County Judge's order.

Feb. 1956—Circuit Court affirmed County Judge.

March 1956—Plaintiff gave notice of appeal from Circuit Court.

July 1957—Florida Supreme Court affirmed except as to certain attorneys' fees and disbursements.

April 1960—Circuit Court awarded attorneys' fees after trial on remand.

May 1960—Circuit Court decision appealed by plaintiff.

June 1961—Florida Supreme Court affirmed Circuit Court.

Oct. 11, 1961—Final discharge.

Oct. 8, 1962—This suit instituted.

In order to consider the defense of prior adjudication, it is necessary to examine the allegations of the complaint as amended.

Count I of the Complaint

Jurisdiction of the Court is invoked on both diversity of citizenship and as "arising under" the 14th Amendment. The first count in some ten pages of pleading may be summarized by indicating that the plaintiffs claims damages for the unlawful taking of her property without due process or equal protection of the laws under the 14th Amendment to the Constitution on the basis that the defendant either procured the guardianship proceeding and appointment thereto or in the alternative subsequently adopted the proceeding, and that the proceeding was void, illegally procured and/or acted upon in fraud of the plaintiff's rights. The entire count in essence is a collateral attack on the decision of the Supreme Court of Florida in Lucom v. Atlantic National Bank, 97 So. 2d 478 (Fla. Sup. 1957) grounded on the theory that the Florida proceedings were void for lack of procedural due process in that the proceedings did not conform to the Florida statutory requisites.

Count II of the Complaint

A summary of the pleading in Count II needs somewhat more detailed analysis since it combines several matters. Paragraph 1 realleges the allegations of Count I, Paragraphs 2, 3, 4 and 8 seek damages for adverse and disloyal actions of the defendant in the abandoned restoration proceedings in Palm Beach County in the Spring of 1954 and in the restoration proceedings in October, 1954 in New York. Paragraphs 5, 6 and 9 complain of negligent failure to collect two promissory notes and negligent failure to secure the return of the plaintiff's personal check which allegedly should have been returned to the plaintiff under an executory agreement with the payee thereof. Paragraph

10 is a shotgun allegation of wrongful disbursement of sums belonging to the estate and actually is again a collateral attack on the accounting approved by the Florida Courts. Paragraphs 11 and 12 attack the guardian's loyalty in regard to the payment to and conduct of the previously appointed guardian of a minor daughter of the plaintiff, and paragraph 11 also charges a libel on co-plaintiff husband, Wilson C. Lucom. Paragraph 7 charges that the bank is holding certain unspecified papers of the plaintiff.

Count III of the Complaint

Count III restates the allegations of Count I, and of paragraphs 2, 3, and 4 of Count II as a conspiracy between the bank and its attorneys, the plaintiff's personal attorney, the plaintiff's two adult children, and the plaintiff's doctor.

Lucom v. Atlantic National Bank in the State Courts

The ward unsuccessfully objected to the approval of defendant's accounting before the County Judge, and in her assignments of error before the Circuit Court of Palm Beach County on appeal she excepted to the defendant's accounting, complained that the Pennsylvania Court's finding that she was "mentally ill" was not a finding of incompetency, and that the appointment of a guardian was therefore without due process of law and without jurisdiction. She also attacked the Pennsylvania proceeding as fraudulent and beyond that Court's jurisdiction, attacked the bank's attorneys' compensation for representing adverse interests, and attacked all allowances of compensation. The Circuit Court overruled all exceptions and affirmed.

The ward again appealed and in her assignments of error before the Supreme Court of Florida renewed all of these objections with particularity as to the jurisdictional

and procedural base for the appointment of the guardian, and specifically raised the due process question under the 14th Amendment of the United States Constitution.

A comparison of plaintiff's assignments of error on appeal in the state Courts with the more prolix pleading in Count I of the present complaint establishes that in substance they are identical. In addition, the assignments of error as to attorneys' fees make it clear that the question of loyalty in paragraphs 2, 3, 4, 8, 11 and 12 was raised in the prior proceedings as well as the question of the propriety of the accounting which is questioned generally in paragraph 10 of the present complaint.

Thus, it can be seen that by the assignments of error the state Courts had before them all of the allegations of the present complaint except those allegations of negligent action contained in paragraphs 5, 6 and 9 of Count II and of failure to return papers in paragraph 7 of Count II. As will be seen below an essential element of Count III was also before the state Courts.

Opinion

Defense of Res Judicata

The decision of the Supreme Court of Florida at 97 So. 2d 478 in the face of these contentions decided three things which are salient to our consideration of the matter. First, the bank ". . . accepted the guardianship in good faith, and has executed the trust to the best of its ability . . . (T)he bank . . . is entitled to an equitable credit for expenditures which were made in good faith for the ward.", and ". . . is entitled to compensation for its services rendered in good faith . . ." Second, the Court while not reaching an absolute decision on plaintiff's contention that the Pennsylvania adjudication of "mentally ill" was insufficient to ground Florida incompetency proceedings because mental illness is not necessarily tantamount to incompetency said, "But this question need not

be decided . . . Even if not a guardian de jure, the bank was a guardian de facto." In other words the Court found a valid guardianship whether in exact conformity to the Florida statutes or not. Finally, the Court indicates that it has considered all of the points raised by the plaintiff here and rejected them, i. e., "The other questions presented here by the appellant have been considered and no reversible error has been found."

This Court need not approve or disapprove the decision of the Supreme Court of Florida. That Court necessarily decided that the proceedings below were not absolutely void.[5] It rejected the plaintiff's contention of denial of due process made at every level of the proceeding, and it approved the good faith of the guardian bank in entering upon and acting upon the guardianship, its accounting, and its proper discharge.

The decision of the Supreme Court of Florida is res judicata between these parties in so far as it (1) rejected the argument that the guardianship proceedings were absolutely void and a nullity and in fact held that they were valid as a guardianship de facto which proceeding the Court expressly sanctioned and recognized as subsisting under Florida law, and (2) denied the contention of the plaintiff that the proceedings were void for lack of due process under the federal constitution.

The plaintiff has urged, since the state Court opinion has no express mention of the constitutional ground, that

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[5] In so determining the Court is aware of the contention of the plaintiff that the state decision has been uniformly interpreted by legal scholars to be a determination that the judgment appointing the guardian was void and a nullity. The scholarly reference is to 14 U. Miami L. Rev. 225 (1959) and 44 C.J.S. pocket part for 217 n. 15. The Court suggests that the very result in the state Court proceedings puts these "scholars" in the situation of proclaiming a logical and semantic absurdity. Their error probably stems from the confusion ever inherent in the problem of void as opposed to voidable proceedings.

therefore as to that matter the judgment is not res judicata. However, the Supreme Court of the United States has expressly rejected such argument where, as here, the question of the constitutional validity of the proceeding was distinctly presented by the appellant to and necessarily was resolved against her by the judgment of the state appellate Court. Grubb v. Public Utilities Comm., 281 U.S. 470, 477 (1930).

Nor does the plaintiff's further contention that the causes of action involved in the present case lack "identity" with the cause of action asserted by the plaintiff in objections to the accounting in the state Courts furnish any greater comfort. The identity of the facts presented to the state Court and the facts pleaded in this action is apparent on their face. Apparently, the plaintiff confuses "cause of action" with relief sought. This is not the law in this circuit or in this state. As was said by one of the great judges of our circuit:

"What is important and determinative now, as to the identity of cause of action, is not identity of form, but of grounds."

Wilson Cypress Co. v. Atlantic Coast Line R. Co., 109 F. 2d 623, 637 (5th Cir. 1940).

The Courts of Florida have consistently held that

". . . identity of causes of action . . . means an identity of the facts essential to the maintenance of the action."

City of Miami Beach v. Prevatt, 97 So. 2d 473, 477 (Fla. Sup. 1957). See also Gordon v. Gordon, 59 So. 2d 40, 44 (Fla. Sup. 1952); Murphy v. Murphy, 10 So. 2d 136, 137 (Fla. Sup. 1942).

We conclude that there is identity of issues in so far as the plaintiff's complaint rests upon the denial of due process and the void as opposed to viodable nature of the state Court proceedings. As demonstrated above the fact

that relief sought differs from that sought in the state Court is of no consequence. Angel v. Bullington, 330 U.S. 183 (1946), is determinative of the case in so far as jurisdiction and due process are concerned. The plaintiff failed to appeal from the adverse decision of the state Supreme Court to the United States Supreme Court and having accepted the verdict of that Court (even though it might be erroneous) cannot relitigate the same issues in a Federal District Court.

"The 'merits' of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the 'merits' of that claim were adjudicated in the only sense that adjudication of the 'merits' is relevant to the principals of res judicata. A State Court cannot sterilize federal claims by putting on the adjudication of local label." 330 U.S. at 190-91.

Nor is the fact that the County Judge's Court is a Court of limited jurisdiction of any comfort to the plaintiffs. It is none the less a Court with authority to determine whether or not it has jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which it is called to act.[6] Its determination of such

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[6] F.S.A. 744.06(1)(a) "The county judge shall have jurisdiction over all matters pertaining to guardian and ward. . . ."

F.S.A. 744.06(1)(b) "The county judge may hear and determine complaints of wards against their guardian. . . ." See United States v. Silliman, 167 F. 2d 607 (3rd Cir. 1948), cert. denied, 335 U.S. 825 (1948) which involved issues very analogous to those sub judice where the original litigation was in the New York Surrogate's Court and the subsequent litigation occurred in the Federal District Court of New Jersey. See also Geracy, Inc. v. Hoover, 133 F. 2d 25 (D.C. Cir. 1942) where defensive matter asserted in Municipal Court precluded subsequent assertion of same claim in District Court and in an amount which would have been in excess of Municipal Court jurisdiction.

questions while open to direct review, may not be assailed collaterally. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 376 (1940).

Plaintiff seeks to apply the doctrine that a void judgment is open to collateral attack at any time. But this doctrine is itself subject to the limitation that there can be only one attack on even a void judgment, for an unsuccessful or abandoned attack becomes itself an adverse adjudication. When plaintiff, after her alleged mistreatment by the County Judge's Court, chose not to make a collateral attack by coming then to this Court, but instead initiated review through the state Court system, she became bound by her choice of remedy. As in Angel v. Bullington, supra, her failure to seek United States Supreme Court review of the adverse decision of the Florida Supreme Court bars her from United States District Court. American Surety Co. v. Baldwin, 287 U.S. 156, 164-66 (1932); Warriner v. Fink, 307 F. 2d 933 (5th Cir. 1962).

As already noted Plaintiff's Count I allegations of procedural irregularity, as distinguished from her allegations there of fraud, all involve the assertion that the Pennsylvania finding of "mentally ill" was an insufficient predicate for a Florida proceeding turning on "incompetency." That contention must fail for still another reason of Florida law, quite apart from prior adverse Florida adjudication. The Florida Guardianship Law provides in the case of a "non-resident"—a term which, as construed in In re Cameron's Estate, 158 Fla. 91, 28 So. 2d 110 (Fla. Sup. 1948), includes plaintiff as a permanent Florida resident temporarily in Pennsylvania under hospital treatment—that an adjudication of "unsoundness

of mind" in the state of hospitalization is "prima facie proof of such incompetency."[7]

Although plaintiff offers here her own affidavit that she was at all material times competent, she does not show here that she tendered any proof of competency in the Florida proceedings. Were the issue of actual competency now open to her, her affidavit proof might raise a question of fact precluding summary judgment, notwithstanding the record of the Pennsylvania proceedings, which is part both of the Florida proceedings and this proceeding here. The Pennsylvania record includes the testimony of her attending psychiatrist to the effect that while hospitalized she was suffering from paranoid delusions[8] and she had difficulty in knowing what property she had and what was being done with it. But the quoted statute, because it turns the Pennsylvania adjudication of "mental illness" into "prima facie proof" of "incompetency," closes that issue

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[7] F.S.A. 744.19 "Petition for appointment of resident guardian for the property of non-resident incompetent . . . (2) if it is alleged that the incompetency is due to mental or physical incapacity, the petition shall be accompanied by a duly certified or exemplified copy of the adjudication of unsoundness of mind or of physical incapacity from the qualified authorities in the state, territory or country where such incompetent is domiciled, and shall state whether said incompetent is in the custody of any person or institution, and if so, shall give the name and address of the custodian. Such adjudication shall constitute prima facie proof of such incompetency."

[8] The record of the Pennsylvania proceeding indicates that at the time of that hearing the physicians in charge of the plaintiff had seen fit to give her a matter of 14 insulin shock treatments for what the testimony indicated was a schizophrenic paranoia.

to her here if only because she did not show here that she rebutted that "prima facie proof" in Florida.[9]

Not only the issues of jurisdiction and due process, but an essential element of the issues of fraud, disloyalty, and conspiracy has been litigated between these parties and has been decided adversely to the plaintiff. The Florida Supreme Court's finding of good faith acceptance and execution of the trust negates the commission of any tortious acts toward the plaintiff which require intent as an essential element. The Court concludes that the plaintiff cannot re-litigate in this Court paragraphs 1, 2, 3, 4, 8, 11, and 12 of Count II. Likewise Count III, the conspiracy count, suffers from the same infirmity. Paragraph 10 of Count II is barred since this was obviously the subject matter of the accounting litigation between the parties.

Paragraphs 5, 6, and 9 of Count II involve negligent administration of the trust. These allegations were not before the state Court. It is the Court's feeling that they properly could have been alleged in the objections to the accounting and claimed as a surcharge and were proper matters to have been considered by the County Judge's

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[9] This Court will not attempt to go behind the Supreme Court decision to guess at the Court's reasoning, but it appears obvious to this Court that very cogent support for the Florida decision might lie in the simple fact that if, in fact, the plaintiff was not incompetent, she could have made direct attack on the guardianship at any time during its pendency in the County Judge's Court. Instead she chose to accept its benefits and then (significantly after her marriage) made her delayed attack in the form of objections to the accounting after having accepted the benefits of the accounting. If she was in fact incompetent, then the equity of the guardianship for her benefit would be unquestioned. It should also be noted that we are dealing with an in rem guardianship of property within the jurisdiction of the Court, not an in personam proceeding.

Court in exercise of its jurisdiction.[10] However, as will appear below it is not necessary for the Court to determine whether or not a plea in bar is applicable to these allegations of negligent administration.

DEFENSE OF LIMITATIONS

As the chart in footnote 3, supra, clearly indicates this suit was instituted 8 years after the plaintiff was restored to competency. It was instituted almost 7½ years after the defendant filed a final accounting and 7½ years after the County judge entered order approving this accounting and provisionally ordered discharge. Yet the plaintiff contends that nonetheless the general statutes of limitations[11]

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[10] Although the negligence contentions are appropriately disposed of by such considerations of law, it may be noted that two of the three negligence paragraphs, alleging failure to collect promissory notes, are met in point of fact by undisputed affidavit proof that the one note complained of was an installment note kept currently paid throughout the administration in the same manner and amount that the ward had accepted before the start of the administration; and the other note did not mature until after defendant's administration terminated. Moreover, in the course of the Florida proceedings before the County Judge, between the first and second appeals to the Florida Supreme Court, plaintiff's attorney made an explicit signed waiver of all surcharge claims except one not here involved, in consideration of defendant's consent to defer execution of its judgment against plaintiff for guardian fees.

[11] F.S.A. § 95.11, "Actions other than those for the recovery of real property can only be commenced as follows: . . . (3) Within five years.—An action upon any contract, obligation or liability founded upon an instrument of writing not under seal. (4) Within four years.—Any action for relief not specifically provided for in this chapter. (5) Within three years.—(a) An action upon a liability created by statute, other than a penalty or forefeiture; (b) An action for trespass upon real property; (c) An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property; (d) An action for relief on the ground of fraud, the cause of action in such case not to be deemed as having accrued until the discovery by the aggrieved party of the facts constituting the fraud; (e) And

were tolled by the provisions of F.S.A. Sec. 746.14, providing a one year limitation from date of discharge.[12] This Court cannot agree with this contention. The one year special statute is on its face a statute of additional limitation. It would be a strained construction to hold that it was intended to exclude or toll the operation of the general statutes of limitation.

It is the duty of the Court to find for apparently conflicting statutes a reasonable field of operation which may preserve the force and effect of each statute and to harmonize them if possible. Ideal Farms Drainage District v. Certain Lands, 154 Fla. 554, 19 So. 2d 234 (1944). This Court does not have any great difficulty in ascertaining the purpose of the legislature in the enactment of F.S.A. Sec. 746.14 and reconciling it with F.S.A. Sec. 95.11. The former, special statute, is an additional statute of limitation. It does not displace the general statute in any way, but adds to it. Thus, if the one year period has expired, but the general statute has not yet run, the special statute will bar the action against the guardian. This is the holding of Beck v. Barnett National Bank of Jacksonville, 142 So. 2d 329 (Fla. App. 1962). However, no Florida case has suggested that F.S.A. Sec. 746.14 should be given the effect

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an action upon a contract, obligation or liability not founded upon an instrument in writing, including an action for goods, wares, and merchandise sold and delivered, and on store accounts. (6) Within two years.—An action by another than the state upon a statute for a penalty or forfeiture; an action for libel, slander, assault, battery or false imprisonment; an action arising upon account of an act causing a wrongful death."

[12] The statute in full is: "Upon the consideration of the application for discharge and of the objections thereto, if any, and of the evidence, if the county judge is satisfied that the guardian has faithfully and completely discharged his duties and has rendered complete and accurate final returns and has delivered the assets of the ward to the person entitled thereto, the county judge shall enter an order of discharge. Such discharge shall operate as a release from the duties of guardianship and as a bar to any suit against said guardian or his surety, unless such suit is commenced within one year from the date of discharge."

of extending the general period of limitations as urged here by the plaintiff. As this Court views the matter the harmony of the legislative scheme both in the general limitation section and in the Florida guardianship law would be perverted if, under the particular facts of this case, it should be held that the special statute operated as a toll.[13] Under this view, the Court need not reach the question of when the one year statute started to run. The plaintiff has urged that it did not run until the final order of discharge was entered after the completion of all litigation in the state Court. But it is noted that substantial reasons can be advanced for holding that the one year statute started running no later than the compliance by the defendant with the provisional order of discharge by the County Judge. This order was ultimately vindicated by the Supreme Court of Florida and even the second judgment of the high Court affirming the lower Court was dated more than one year prior to the institution of this suit.

The defendant has cited many cases to the effect that disability at and after the accrual of the cause of action did not toll the limitation statute. The Court need not express its view of this argument. Eight years elapsed from plaintiff's restoration to competency before this suit was instituted. Her husband, co-plaintiff, has never been incompetent. The trust relationship in regard to the property terminated some 7½ years prior to institution of this action by the turnover of the property by the bank to the plaintiff. Even if this was not true, the plaintiff is embroiled in the net of circular argument whereby she argues on one hand that she was never incompetent, and on the other endeavors with self-defeating sophistry to maintain that the statute was tolled by her disability. See cases annotated at 166 A.L.R. 960.

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[13] This Court is faced with the specific question as a matter of first impression in this state. However, we find that the Supreme Court of Florida in analogous situations has applied similar reasoning. See c.f., Palmquist v. Johnson, 41 So. 2d 313 (Fla. Sup. 1949); Perry v. Reichert, 113 Fla. 125, 151 So. 403 (1933).

In summary, the weakness of the plaintiff's position is plainly demonstrated if the problems of res judicata are ignored. If it is assumed arguendo that the plaintiff's contentions as to the nature of this action are accepted, it indeed would be an anomaly for this Court to also hold that a person sui juris could be precluded by a void probate proceeding from bringing this action for fraud and conspiracy at any time after the cause of action arose.[14] If plaintiff's contention is right, she has slept upon her alleged rights for a period considerably in excess of the statutory period of limitations.

The foregoing considerations will result in the entry of summary judgment for defendant on all issues other than the matter of withholding papers, paragraph 7 of Count II. The papers withheld are not specified in the complaint. The answer sets out a general denial, while the affidavit of the defendant's trust officer admits possession of papers but asserts that defendant is willing to turn any of plaintiff's papers over on payment of copying charges. Thus, this issue is not ripe for disposition on motion for summary judgment. Therefore the motion for summary judgment is granted as to all issues and all counts with the exception of paragraph 7 of Count II; the defendant may within five (5) days from the entry hereof notice for hearing its motion to dismiss said paragraph for failure to state a cause of action, which motion was filed but has not been noticed for hearing, and with leave to plaintiff's within ten (10) days from entry hereof to amend paragraph 7 of Count II to specify the papers withheld.

Entered at Miami, Florida this the 8th day of August, 1963.

EMETT C. CHOATE,
United States District Judge.

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[14] See F.S.A. Sec. 744.61. And see Ritter v. Ritter, 219 Ind. 487, 38 N.E. 2d 997 (1942), Dye v. Dodd, 226 N.W. 565 (S. Dak. 1929).

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1957

Case No. 28,614

VIRGINIA WILLYS LUCOM (Formerly Virginia Willys de Landa), *Appellant*,

v.

ATLANTIC NATIONAL BANK OF WEST PALM BEACH, POTTER, LANGBEIN & BURDICK, J. W. SALISBURY, *Appellees*.

Opinion filed July 10, 1957. [97 So. 2d 478]

An appeal from the Circuit Court for Palm Beach County, Aquilino Lopez, Judge.

Clyde Trammell, Jr., and Charles M. Trammell, for Appellant.

J. W. Salisbury, for Appellees.

ROBERTS, J.

This appeal brings here for review an order of the Circuit Court of Palm Beach County affirming an order of the County Judge approving a final accounting of the appellee, Atlantic National Bank of West Palm Beach, as guardian of the property of the appellant during her alleged incompetency, and awarding fees and costs to the guardian and its attorneys. The appellant's principal contentions here are (1) that neither the guardian nor its attorneys are entitled to compensation because the entire guardianship proceedings were null and void; and (2) that, even if compensation is allowable, the County Judge erroneously applied a straight percentage of the gross value of the estate in fixing the amount of compensation payable to the guardian and its attorneys without considering the actual value of the services rendered.

The background against which these questions must be decided is as follows: Appellant was first adjudicated incompetent by the County Judge of Palm Beach County, Florida, in December 1952 during her confinement in the Pennsylvania Hospital in Philadelphia, Pa., for treatment of a mental illness. She was released from the hospital in April 1953 and was judicially restored to competency by order of the Circuit Court of Palm Beach County in May 1953. The appellee bank was appointed and acted as co-guardian of appellant's property during this period of incompetency. In July of 1953 her illness recurred and she voluntarily returned to the same hospital for further treatment. In what was apparently an attempt to follow the procedure approved in In re Cameron's Estate, 158 Fla. 91, 28 So. 2d 110, for obtaining the appointment of a guardian of the property in this state of a Florida resident who is adjudged incompetent by the Court of another state while temporarily residing there, a habeas corpus proceeding was initiated in a Pennsylvania Court by Appellant's son and daughter, allegedly on behalf of appellant, under the provisions of the Pennsylvania Mental Health Act of 1951, Sec. 1072 et seq., Purdon's Penna. Law. This proceeding culminated in an order of the Pennsylvania Court, dated Sept. 15, 1953, finding that appellant was "mentally ill" within the meaning of that Act defining "mental illness" as "an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care", and declining to release appellant from the Pennsylvania Hospital. Upon the basis of this order and the transcript of the habeas corpus proceedings in which it was entered, the County Judge of Palm Beach County, by order dated October 7, 1953, reappointed the appellee bank as guardian of the property of the appellant, the petition for such appointment having been filed by the appellants son and daughter, both sui juris. The appellant

was released from the Pennsylvania Hospital in December 1953 and returned to her home in Palm Beach, Florida. Sometime after May 1953 she established residence in the state of New York and, in October 1954, was adjudicated to be competent to manage her property by a Court of that jurisdiction. The questions presented here and in the Court below arose upon objections filed by the appellant to the bank's final accounting of its administration of her estate and application for compensation for itself and its attorneys.

There is some merit to the appellant's contention that an order adjudicating that a person is so mentally ill as to require further treatment in a hospital is not an adjudication of "incompetency" insofar as the ability to manage property is concerned. Cf. In re Weightman's Estate (Pa. Super. 1937) 190 A. 552; In re Refior (Pa. Super. 1947) 50 A. 2d 523, 527; In re Lambert (N. J. Super. 1954) 109 A. 2d 423; Fleming v. Bithell (Idaho 1935) 52 P. 2d 1099; People v. McConnell (Cal. Dist. App. 1927) 252 Pac. 1068; Manello v. Bornstine (Wash. 1954) 270 P. 2d 1059. But this question need not be decided, since we are here dealing with a fait accompli—the appellee bank was re-appointed by the County judge, accepted the guardianship in good faith, and has executed the trust to the best of its ability. Even if not a guardian de jure, the bank was a guardian de facto of the appellant's property and, as such, is entitled to an equitable credit for expenditures which were made in good faith for the ward, Alexander v. Hillebrand (Mich. 1905) 103 N. W. 849; Smith v. Cameron (Mich. 1909) 122 N. W. 564; Pemberton v. Leatherwood (Tex. Civ. App. 1949) 218 S. W. 2d 500; Maryland Casualty Co. v. Lawing (N. C. 1945) 33 S. E. 2d 609; In re Beisel's Estate (Cal. 1895) 40 Pac. 961; and, in the proper circumstances, a guardian de facto is entitled to reasonable compensation for its services in behalf of the ward. See Kelly v. Kelly (Mont. 1931) 297 Pac. 470; Jessup v. Jessup (Ind. App. 1897) 46 N. E. 550; Harwood

v. Boardman (1866) 38 Vt. 554. But see Powers v. Chisman (Ark. 1950) 231 S. W. 2d 598.

In all the circumstances here, we think the appellee bank is entitled to compensation for its services rendered in good faith to the appellant and that the lower Courts did not err in so holding. The same thing is true of the services of counsel employed by the appellee bank.

But the compensation allowable to the bank, as guardian, must be "just and reasonable", Sec. 745.32, Fla. Stat. 1955; and those allowable to the attorneys must have been rendered "to the ward or to the guardian in the ward's behalf", Sec. 745.33, Fla. Stat. 1955. In the absence of statutory authorization therefor, the Court cannot arbitrarily fix a fee schedule and, without evidence of reasonable value of the services rendered, determine what is "just and reasonable" compensation. See In re Messer's Guardianship (Wis. 1943) 7 N. W. 2d 584.

Insofar as the compensation awarded the appellee bank is concerned, it appears that the Court's determination may have been based, in part, upon a consideration of comparable fees allowed by statute to executors and administrators for the administration of decedent's estates, Sec. 734.01, Fla. Stat. 1955. But there was other evidence as to the services rendered by the appellee bank and the reasonable value thereof, sufficient to support the award of compensation. Accordingly, the appellant's contention that the compensation awarded to the appellee bank was a "gross abuse of discretion" cannot be sustained.

As to the amount of the fee awarded to the appellees Potter, Langbein and Burdick, as counsel for the bank, an entirely different situation is presented. The record shows that in all litigation instituted or defended by the appellee bank in behalf of the ward the bank was represented by other counsel; and in most of the litigation these appellees acted as counsel for the appellant's son or daughter, or

both, in opposition to the appellee bank or to the appellant. All of the testimony adduced by appellees on the matter of their fees was based on a percentage of the value of the incompetent's estate, although there was testimony of the value of "extraordinary" services performed by counsel, such as representing the appellant's son in obtaining his appointment as guardian of an infant daughter of appellant, and rendering "supervisory" services over litigation actually conducted by other out-of-state or local counsel employed by the appellee bank for that purpose. The order allowing compensation to these attorneys did not set forth the particular services for which compensation was granted, so we are unable to tell what claims were granted and which were disallowed. In all the circumstances here, we think the ends of justice require that the compensation order be reversed as to the appellees Potter, Langbein and Burdick, and the cause remanded for further consideration of this question, remembering that a Court "is without power to measure an attorney's fee except on the basis of quantum meruit or a quid proquo," Brickell v. Di Pietro (1943) 152 Fla. 429, 12 So. 2d 782, and that under the statute the only services compensable are those rendered either to the ward or to the guardian in the ward's behalf.

The appellant also questions here certain items of costs claimed by the appellee bank and the appellees Potter, Langbein and Burdick. Three of the items relate to the activity of the appellee counsel in attending the New York proceedings by which appellant sought and obtained an adjudication of her competency, in which the appellee counsel represented the appellant's son and daughter (not the appellee bank, which employed other counsel) and unsuccessfully opposed the appellant's petition. Clearly, these are not proper items of expense incurred on behalf of the appellant. Two of the items are attorney's fees for out-of-state counsel employed by the bank—one for the New York counsel who was employed by the appellee bank

to "stand by" and observe the New York proceedings referred to above, the bank taking a position of strict neutrality in the proceedings; and the other for Philadelphia counsel who successfully opposed the appellant's suit for a declaratory decree as to the effect of the September 1953 order entered in the habeas corpus proceedings which formed the basis for the appointment of the bank as guardian of appellant's property. Both of these expense items appear to have been incurred solely for the benefit and protection of the guardian itself, and not for the appellant's benefit or protection. They were not, therefore, items of expense properly chargeable against appellant.

The remaining item is a charge of $50 incurred by appellee counsel as a fee to an attorney employed by them to investigate Wilson C. Lucom, whom the appellant married in May of 1954, some five months after her release from the hospital. Appellee counsel contend that this is a proper charge against appellant because it was to the interest of appellant's minor child (who was under the guardianship of appellant's son) to have information concerning her mother's new husband and it was thus a proper charge against appellant "for the care, support and maintenance of the dependents, if any, of the ward," as authorized by Sec. 744.64, Fla. Stat. 1955. This contention is obviously without merit, and no other basis for this charge has been suggested nor can be conceived.

The other questions presented here by the appellant have been considered and no reversible error has been found.

Affirmed in part and reversed in part and the cause remanded for further proceedings not inconsistent herewith.

TERRELL, C. J., THOMES, THORNEL and O'CONNELL, JJ., Concur.